

IN THE DISTRICT COURT IN AND FOR TULSA COUNTY  
STATE OF OKLAHOMA

DISTRICT COURT  
**FILED**

NOV 28 2005

SALLY HOWE SMITH, COURT CLERK  
STATE OF OKLA: TULSA COUNTY

DONALD J. BAHNMAIER, an individual,  
on behalf of himself and all others similarly  
situated,

Plaintiff,

vs.

SONY BMG MUSIC ENTERTAINMENT, a  
Delaware general partnership,

Defendant.

Case No.

CJ 2005 06968

Judge

Gordon D. McAllister, Jr.

**CLASS ACTION PETITION**

Plaintiff, on behalf of himself and as representative of a class of persons similarly situated, alleges as follows:

1. Plaintiff Donald J. Bahnmaier (hereinafter "Plaintiff") is a resident of Tulsa County, Oklahoma.
2. Defendant Sony BMG Music Entertainment (hereinafter "Sony BMG") is a Delaware general partnership, with its principal place of business in New York.

**Summary of Action & General Allegations**

3. Sony BMG is currently one of the world's largest music companies. Its labels include Arista Records, BMG Classics, BMG Heritage, BMG International Companies, Columbia Records, Epic Records, J Records, Jive Records, LaFace Records, Legacy Recordings, Provident Music Group, RCA Records, RCA Victor Group, RLG - Nashville, Sony Classical, Sony Music International, Sony Music Nashville, Sony Wonder, Sony Urban Music, So So Def Records, and Verity Records.

4. Beginning in 2003, Sony BMG began selling compact discs (hereinafter "CDs") containing Digital Rights Management software (hereinafter "DRM") to consumers. The DRM software used by Sony BMG includes the products XCP, Music Player, and/or MediaMax (further described herein).

5. It is likely that hundreds of thousands if not millions of consumers have played CDs that utilize XCP, Music Player, and/or MediaMax on their personal computers (hereinafter "PCs").

5.1. The use of PCs in conjunction with music CDs is common with the advent of various digital music players (such as the popular iPod™ music player manufactured by Apple Computer, Inc.).

5.2. Digital music players have a great advantage over conventional CD players in that digital music players have the ability to permanently store hundreds of albums and thousands of songs on a single device not much larger than a cellular phone.

5.3. PCs are necessary to transfer music from a CD or a CD collection to a digital music player.

5.4. Furthermore, conventional stereo systems in the home and college dorm are being displaced by PCs. CD owners simply copy their library of CDs to their PC and use the PC as the playback device thereby eliminating the need to shuffle CDs or own a conventional stereo system.

### XCP

6. In 2002, First 4 Internet, Ltd. (hereinafter "F4i") introduced for commercial use a copyright protection technology for music CDs marketed as XCP (Extended Copyright Protection).

7. According to F4i, "XCP technology protects the content of an audio disc without compromising playability or quality."

8. There are several "classes" of XCP technology, including, but not necessarily limited to: XCP1, XCP2, XCP Red, and XCP-V.

8.1. XCP1 is a pre-release copyright protection technology used by record labels to protect pre-release music on internal CD recordable media devices and reduce music leaks prior to album releases.

8.2. XCP2 is a post-release copyright protection technology used by record labels to protect post-release music on commercially pressed CDs.

8.3. XCP Red is a pre-release copyright protection technology used by record labels to protect pre-release music on internal CD recordable media devices and reduce music leaks prior to album releases. XCP Red is similar to XCP1, but differs in that it permits playback only on specific devices.

8.4. XCP-V is a copyright protection technology used to protect digital film content on DVD formats.

9. In 2005, Sony BMG began using F4i's XCP technology (believed to be XCP2 or a variation thereof, but hereinafter referred to as "XCP") on some CDs sold in the United States.

10. On information and belief, in excess of 3 million copies of Sony BMG CDs utilizing XCP have been sold.

11. It is likely that hundreds of thousands of consumers have played these CDs on their PCs.

12. XCP installs itself without giving consumers meaningful notice and without obtaining consent.

13. The Sony BMG CDs utilizing the XCP technology contain a hidden "rootkit" software program called "XCP.Sony.Rootkit" (hereinafter "XCP Rootkit") that, when used in conjunction

with a consumer's PC, installs into the "root" of the consumer's PC without the knowledge or permission of the consumer.

14. XCP Rootkit is listed by Computer Associates as a "Trojan." According to Computer Associates:

14.1. XCP Rootkit "[i]nstalls without user permission, presenting only a vague and misleading EULA[,]"

14.2. XCP Rootkit "[c]hanges system configuration without user permission at the time of change[,]"

14.3. XCP Rootkit "[d]efends against removal of, or changes to, its components[,]"

14.4. XCP Rootkit "[s]ilently modifies other programs' information or website content as displayed[,]"

14.5. XCP Rootkit "[i]ncludes mechanisms to thwart removal by security or anti-spyware products[,]" and

14.6. XCP Rootkit "[c]annot be uninstalled by Windows Add/Remove Programs and no uninstaller is provided with application."

14.7. "XCP.Sony.Rootkit installs a DRM executable as a Windows service, but misleadingly names this service 'Plug and Play Device Manager', employing a technique commonly used by malware authors to fool everyday users into believing this is a part of Windows. Approximately every 1.5 seconds this service queries the primary executables associated with all processes running on the machine, resulting in nearly continuous read attempts on the hard drive. This has been shown to shorten the drive's lifespan."

14.8. "XCP.Sony.Rootkit installs a device driver, specifically a CD-ROM filter driver, which intercepts calls to the CD-ROM drive. If any process other than the included Mu-

sic Player (player.exe) attempts to read the audio section of the CD, the filter driver inserts seemingly random noise into the returned data making the music unlistenable."

14.9. "XCP.Sony.Rootkit loads a system filter driver which intercepts all calls for process, directory or registry listings, even those unrelated to the Sony BMG application. This rootkit driver modifies what information is visible to the operating system in order to cloak the Sony BMG software. This is commonly referred to as rootkit technology. Furthermore, the rootkit does not only affect XCP.Sony.Rootkit's files. This rootkit hides every file, process, or registry key beginning with \$sys\$. This represents a vulnerability, which has already been exploited [...] and could potentially hide an attacker's files and processes once access to an infected system had been gained."

14.10. "XCP.Sony.Rootkit modifies you [sic] operating system at a low level, represents a large threat to both corporate and consumer users system integrity."

14.11. "The Rootkit functionality hides files and enables hackers and other spyware to hide files with impunity."

14.12. "Access to the user's CD-ROM will be disabled if XCP.Sony.Rootkit is removed manually, due to the missing filter driver. Reconfiguring the CD-ROM driver to a functioning state will be beyond the ability of the average home user. No uninstaller is included with XCP.Sony.Rootkit. Sony BMG has indicated that an uninstaller is available here. Analysis of the uninstaller has shown that it leaves significant vulnerabilities open after running. These vulnerabilities would allow hostile web sites to remotely execute code on a user's machine, among other things."

15. XPC Rootkit exposes PCs to computer viruses.

15.1. One such virus is Win32.OutsBot.U. According to Computer Associates:

15.1.1. "Win32.OutsBot.U is an IRC-controlled backdoor trojan that allows unauthorized access to an affected machine."

15.1.2. "Once connected OutsBot can receive the following commands from its controller: Execute or delete files[,] Disconnect from the IRC channel[,] Remove itself from the affected machine[,] Update itself[,] Retrieve machine information (such as: CPU speed, RAM, Operating System, username, IP address)[,] Download files[, and] Restart itself[.]"

15.1.3. "This variant of OutsBot attempts to circumvent Windows Firewall protection by adding itself to the list of programs allowed to access the Internet."

15.1.4. "This variant has attracted considerable media attention due to the stealth technique it employs. The trojan utilizes a stealth function from the XCP.Sony.Rootkit, (and therefore this stealth function is only effective on machines where this application is already installed and active)."

15.2. Another such virus is Win32.OutsBot.V. According to Computer Associates:

15.2.1. "Win32.OutsBot.V is an IRC-controlled backdoor trojan that allows unauthorized access to an affected machine."

15.2.2. "Once connected OutsBot can receive the following commands from its controller: Execute or delete files[,] Disconnect from the IRC channel[,] Remove itself from the affected machine[,] Update itself[,] Retrieve machine information (such as: CPU speed, RAM, Operating System, username, IP address)[,] Download files[, and] Restart itself[.]"

15.2.3. "This variant of OutsBot attempts to circumvent Windows Firewall protection by adding itself to the list of programs allowed to access the Internet."

15.2.4. "This variant has attracted considerable media attention due to the stealth technique it employs. The trojan utilizes a stealth function from the XCP.Sony.Rootkit, (and therefore this stealth function is only effective on machines where this application is already installed and active)."

16. XCP Rootkit is listed by Symantec as a "security risk."

17. XCP Rootkit installs itself without giving consumers meaningful notice and without obtaining consent.

### Music Player

18. Sony BMG CDs utilizing XCP technology also contain a media player software program (hereinafter "Music Player").

19. Music Player installs itself without giving consumers meaningful notice and without obtaining consent.

20. Music Player is listed by Computer Associates as "spyware." According to Computer Associates:

20.1. Music Player "[o]pens connections to Sony BMG to pull down information[.]"

20.2. Music Player "[s]ilently connects to an unintended site to transmit user data[.]"  
and

20.3. Music Player "[s]ilently tracks input into the computer[.]"

20.4. "The only way to play an XCP DRM Protected Sony BMG music CD on a computer is through Music Player, a media player provided on the CD. Other players will not recognize the CD as an audio CD, and will instead try to open the files on it as a data CD. When launched from the CD, Music Player sends information back to Sony BMG, indicating which album is being played."

20.5. "Upon launching the player, it attempts to connect to servers registered to Sony BMG and located in Cary, NC. The application then sends an HTTP request to 66.14.39.158 that contains an ID number as a get parameter. This ID determines which page the request is redirected to, and appears to identify the Artist/CD being played. This information is sent to Sony BMG each time the CD is played, which could allow Sony BMG to compile a log of when and how often the machine at a particular IP address has listened to each protected CD, allowing Sony BMG to build a profile of individual user listening habits."

20.6. "The information returned to Sony BMG could allow them to build profiles of individual user listening habits."

### MediaMax

21. In late 2002 or early 2003, SunnComm Technologies, Inc. (hereinafter "SunnComm") introduced for commercial use a copyright protection technology for music CDs marketed as MediaMax.

22. Sony BMG currently uses SunnComm's MediaMax technology on some CDs sold in the United States.

23. On information and belief, in excess of 20 million copies of Sony BMG CDs utilizing MediaMax have been sold.

24. It is likely that hundreds of thousands of consumers have played these CDs on their PCs.

25. MediaMax installs itself without giving consumers meaningful consent or notice.

26. On information and belief, MediaMax causes itself to contact a Sony BMG or SunnComm server via the internet without the consumer's consent. The album is identified by



the server as well as the operating system and web browser. Files are downloaded and stored on the consumer's PC without consent from the consumer.

27. On information and belief, MediaMax transmits the consumer's IP address to Sony BMG servers or those controlled by its agents without the permission of the consumer.

28. Sony BMG distributed for sale and sold music CDs utilizing the XCP Rootkit, Music Player, and/or MediaMax to consumers throughout Oklahoma via various conventional and online retail outlets. Those retail outlets include, but may not be limited to: Amazon.com, Barnes & Noble, Best Buy, Borders Books & Music, Camelot Music, Circuit City, MusicLand, Sam Goody, Target, and Wal-Mart.

29. Plaintiff purchased a Sony BMG music CD utilizing the XCP, Music Player, and/or MediaMax technologies and played it on his PC thereby installing the XCP Rootkit, Music Player, and/or MediaMax onto his PC.

#### **Class Action Allegations**

30. This action is instituted by Plaintiff on behalf of himself and as the representative of a class of all other persons similarly situated to Plaintiff.

31. The class of persons is defined as follows: a) all persons and entities that are residents of Oklahoma only that have purchased one or more Sony BMG music CDs with the XCP and/or Music Player and/or MediaMax technologies thereon, b) all persons and entities that are residents of Oklahoma only that have played any Sony BMG music CDs with the XCP and/or Music Player and/or MediaMax technologies on their PC resulting in the installation of the XCP Rootkit and/or Music Player and/or MediaMax. Specifically excluded from the class are Sony BMG and any person, firm, trust, corporation, or other entity related to or affiliated with Sony BMG.

32. Plaintiff believes the class includes thousands of persons and entities, and the class is so numerous that joinder of all members of the class would be impracticable.

33. The common questions of law and fact predominate over individual issues, because the common issues are central to this case. The claims asserted by Plaintiff on behalf of himself and as representative of the class present questions of law and fact that are common to the class, including without limitation the following:

33.1. Whether Sony BMG adequately disclosed the nature and purpose of XCP and the XCP Rootkit on its CDs.

33.2. Whether Sony BMG adequately disclosed the nature and purpose of Music Player on its CDs.

33.3. Whether Sony BMG adequately disclosed the nature and purpose of MediaMax on its CDs.

33.4. Whether Sony BMG made representations that Sony BMG music CDs utilizing the XCP, Music Player, and/or MediaMax technologies had characteristics, uses, benefits, or qualities that they did not have.

33.5. Whether Sony BMG made false and/or misleading statements of fact to the class and public concerning the content of the Sony BMG music CDs utilizing the XCP, Music Player, and/or MediaMax technologies.

33.6. Whether Sony BMG knew, or was reckless in not knowing, that XCP Rootkit, Music Player, and/or MediaMax would detrimentally affect PCs of consumers who installed the Sony BMG music CDs utilizing the XCP, Music Player, and/or MediaMax technologies on their PCs.

33.7. Whether Sony BMG engaged in deceptive and unfair trade practices.

33.8. Whether Sony BMG invaded the privacy of consumers.

33.9. Whether Sony BMG negligently manufactured CDs that were later sold to consumers.

33.10. Whether Plaintiff and the class are entitled to relief, and the amount and nature of such relief.

33.11. Whether Sony BMG is liable for punitive damages, and if so, what amount.

34. The claims asserted by Plaintiff on behalf of himself are typical of the claims asserted for the class in that: all members of the class have sustained damages arising out of Sony BMG's violation of common and statutory law as alleged herein.

35. Plaintiff and Plaintiff's counsel will fairly and adequately represent the interests of the class. Plaintiff has no interests that conflict in any way with those of the class.

36. This action may be maintained as a class action under *Okla. Stat. tit. 12, § 2023(B)(3)* because the questions of law and fact that are common to the class members predominate over individual issues, and a class action is superior to other methods available for resolution of this controversy.

37. A class action is superior to other methods for resolution of this controversy, because the damages suffered by individual class members would in many instances be relatively small, and the financial burden on individual class members would make it impractical for them to pursue their claims against Defendants individually. Judicial economy would be served by maintenance of this action as a class action, because otherwise there will be numerous individual lawsuits filed by the class members. There are no obstacles to effective and efficient management of this action as a class action by this Court.

**Plaintiff's First Claim for Relief:**  
**Negligence**

38. Plaintiff adopts by reference the previous allegations in this Petition.

39. At all times, Sony BMG was under a duty to exercise reasonable care in connection with manufacturing CDs it sells to consumers.

40. Sony BMG's duty of care referenced in the preceding paragraph extended to Plaintiff and class, whom Sony BMG foresaw or reasonably should have foreseen would be damaged in the event its CDs were negligently manufactured.

41. Sony BMG and/or its agents, servants, subcontractors, or employees acting within the scope of their employment breached the duty of care by negligently and/or recklessly and/or carelessly manufacturing CDs in the following particulars: manufacturing and selling CDs containing DRM software that causes harm to consumer PCs and manufacturing and selling CDs containing DRM software that exposes consumer PCs to viruses and malware.

42. As a proximate result of Sony BMG's negligence as alleged in this claim for relief, Plaintiff and class have been and may be further damaged in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial.

**Plaintiff's Second Claim for Relief:**  
**Trespass to Chattels**

43. Plaintiff adopts by reference the previous allegations in this Petition.

44. By installing software on Plaintiff's PC without permission of Plaintiff, Sony BMG is using and intermeddling with the chattel of another.

45. Plaintiff and class have been damaged and may be further damaged thereby in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial.

**Plaintiff's Third Claim for Relief:**

## Fraud

46. Plaintiff adopts by reference the previous allegations in this Petition.
47. Sony BMG has made misrepresentations and omissions of material facts.
48. On information and belief, Sony BMG disseminates CDs containing the XCP Rootkit, Music Player, and/or MediaMax technologies with identical End User License Agreements (hereinafter EULA).
49. Sony BMG's EULAs falsely state that the DRM software installed on a consumer's PC will not collect any personal information.
50. Sony BMG falsely stated that its DRM software "does not compromise security."
51. These misrepresentations and omissions and others contained herein were likely to deceive consumers.
52. Sony BMG knew or should have known that these misrepresentations and omissions were false and misleading.
53. Plaintiff and class were deceived by these misrepresentations and omissions.
54. Plaintiff and class relied on these misrepresentations and omissions to their detriment.
55. Plaintiff and class have been damaged and may be further damaged thereby in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial.

### **Plaintiff's Fourth Claim for Relief: Invasion of Privacy**

56. Plaintiff adopts by reference the previous allegations in this Petition.
57. By obtaining information from the PCs of Plaintiff and the class without the permission of Plaintiff or class, Sony BMG has committed a nonconsensual intrusion.

58. This nonconsensual intrusion committed by Sony BMG is highly offensive to a reasonable person.

59. Plaintiff and class have been damaged and may be further damaged thereby in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial.

**Plaintiff's Fifth Claim for Relief:  
Breach of Implied Warranty of Merchantability**

60. Plaintiff adopts by reference the previous allegations in this Petition.

61. On information and belief, Sony BMG was and is in the business of, and is a merchant within the meaning of *Okla. Stat. tit. 12A, § 2-104(1)* with respect to the manufacture and sale of music CDs.

62. The CDs sold by Sony BMG are goods within the meaning of *Okla. Stat. tit. 12A, § 2-105(1)*.

63. In selling CDs, Sony BMG warranted that the CDs were merchantable and of merchantable quality and were reasonably fit and suitable for their general purpose and their intended and ordinary use.

64. Sony BMG breached its implied warranty of merchantability by manufacturing and selling CDs containing DRM software that causes harm to consumer PCs.

65. Plaintiff and class have been damaged and may be further damaged thereby in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial.

**Plaintiff's Sixth Claim for Relief:  
Violation of the Oklahoma Consumer Protection Act**

66. Plaintiff adopts by reference the previous allegations in this Petition.

67. Sony BMG's actions described herein are misrepresentations and omissions that have deceived or could reasonably be expected to deceive or mislead Plaintiff and class to the detriment of Plaintiff and class.

68. Sony BMG's actions described herein offend established public policy and are unethical, oppressive, unscrupulous and substantially injurious to consumers, including Plaintiff and class.

69. These are unfair and deceptive trade practice as defined in *Okla. Stat. tit. 15, § 752*.

70. Plaintiff and class have been damaged and may be further damaged thereby in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial.


**WHEREFORE**, Plaintiff, on behalf of himself and all other members of the class, demands Judgment against Sony BMG as follows:

- a) With respect to the class claims, declaring the action to be a proper class action and designating Plaintiff and his counsel as representatives thereof;
- b) On the First Claim for Relief herein, in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial;
- c) On the Second Claim for Relief herein, in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial;
- d) On the Third Claim for Relief herein, in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial;

- e) On the Fourth Claim for Relief herein, in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial;
- f) On the Fifth Claim for Relief herein, in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial;
- g) On the Sixth Claim for Relief herein, in an amount in excess of Ten Thousand and 00/100 Dollars (\$10,000.00), and in the amount of other damages that Plaintiff and class may prove at trial;
- h) Requiring Sony BMG to disgorge all profits to Plaintiff and/or class and/or the State of Oklahoma realized by its unlawful conduct;
- i) Awarding any treble and/or punitive damages to the extent permitted by law;
- j) Awarding Plaintiff reasonable attorney fees and costs;
- k) Awarding pre- and post-judgment interest;
- l) Ordering such funds or assets be impounded, or a trust imposed, to avoid dissipation, fraudulent transfers, and/or concealment of such monies or assets by Sony BMG; and
- m) Granting such other and further relief that this Court deems equitable and proper.

Respectfully submitted,

**JAMES, POTTS & WULFERS, INC.**

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